FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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WASHINGTON, D.C. 20006

August 18, 1999

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket Nos. WEVA 95-194-M
	:	WEVA 95-221-M
v.	:	WEVA 95-321-M
	:	
CAPITOL CEMENT CORPORATION	:	

BEFORE: Jordan, Chairman; Marks, Riley, Verheggen, and Beatty, Commissioners

DECISION

BY: Jordan, Chairman; Marks and Beatty, Commissioners

These civil penalty proceedings, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act" or "Act"), raise the issues of whether Administrative Law Judge Gary Melick denied due process to Capitol Cement Corporation ("Capitol") by conducting a hearing in which a witness asserted the Fifth Amendment privilege against self-incrimination,[1] whether the judge properly concluded that violations of 30 C.F.R.

[1] The Fifth Amendment to the United States Constitution provides that no person "shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V.

§§ 56.12016[2] and 56.15005[3] by Capitol resulted from its unwarrantable failure to comply with the standards, and whether the negligence of two supervisors is imputable to Capitol for civil penalty purposes. 19 FMSHRC 531 (Mar. 1997) (ALJ). For the reasons that follow, we reject Capitol's due process claim and affirm the judge's findings of unwarrantable failure and his penalty assessments.

I.

Factual and Procedural Background

This case involves two citations and a withdrawal order arising from two separate accidents at Capitol's Martinsburg Plant in Berkeley County, West Virginia. The Martinsburg Plant operates a limestone quarry and crushing facility and a cement manufacturing facility. Tr. 16-17.

A. Bonfili's Accident

On October 21, 1994, shift supervisor Gregory Bonfili was injured when he contacted the energized rail, or "hot rail," of an overhead crane while responding to a safety concern of the crane operator, Charlie Cook. 19 FMSHRC at 533. The rail provides 480-volt alternating current electrical power to the crane, which is used to move materials inside a 600-foot long, 80-foot wide, and 75-foot high storage building. *Id.* The crane runs across the building on a "craneway," under which the hot rail is located. *Id.*; Tr. 76. The height of the crane is adjustable and varies according to the amount of material below the crane. *Id.* At the time of the accident, the crane was suspended approximately 60 feet above the ground. 19 FMSHRC at 533. The crane is operated onboard and is usually accessed by one of several boarding platforms along the craneway, which have guardrails to protect against falling. *Id.*; Tr. 77, 160. The craneway also has a 3-foot-wide walkway, which does not have a guardrail but has a cable to which persons can tie off safety belts. 19 FMSHRC at 533; Tr. 77-78, 160-61. The crane can be deenergized in three ways: a circuit breaker onboard the crane deenergizes the crane only; a circuit breaker on

[2] Section 56.12016 states, in part:

> Electrically powered equipment shall be deenergized before mechanical work is done on such equipment. Power switches shall be locked out or other measures taken which shall prevent the equipment from being energized without the knowledge of the individuals working on it.

[3] Section 56.15005 states, in part:

> Safety belts and lines shall be worn when persons work where there is danger of falling . . . .

the third floor of the building (which, at the time of the accident, was one level below the crane) deenergizes the crane and the rail; and a circuit breaker on the ground floor of the building deenergizes the entire section, including the crane and rail. 19 FMSHRC at 533; Tr. 78-79, 120.

Responding to Cook's concern that the crane was shaking, Bonfili boarded the crane and rode back and forth along the craneway to observe the crane's movement. 19 FMSHRC at 533, 534; Tr. 79. Bonfili then directed Cook to deenergize the crane and, without deenergizing the rail or wearing a safety belt, Bonfili went onto the craneway to examine the structure. 19 FMSHRC at 533. During the examination, Bonfili reached over the side and contacted the hot rail. *Id.*; Tr. 20, 79. In order to deenergize the rail, Cook ran along the craneway for a distance of approximately 40 feet and down a stairway to the circuit breaker located on the third floor of the building. 19 FMSHRC at 533; Tr. 154. Bonfili received severe burns to his forearm. 19 FMSHRC at 533; Tr. 20.

Following the accident, Edward Skvarch, an inspector with the Department of Labor's Mine Safety and Health Administration ("MSHA"), conducted an accident investigation and, pursuant to section 104(a) of the Mine Act, 30 U.S.C. § 814(a), issued Capitol Citation No. 4294023 alleging a significant and substantial ("S&S")[4] violation of section 56.12016 for Bonfili's failure to deenergize equipment before doing mechanical work and Order No. 4294024 alleging an S&S violation of section 56.15005 for Bonfili's failure to wear a safety belt when working where there is danger of falling. 19 FMSHRC at 532-33; Gov't Exs. 1 & 2. Both the citation and order were later modified to allege unwarrantable failure to comply with the standards under section 104(d)(1) of the Mine Act, 30 U.S.C. § 814(d)(1). *Id.* The Secretary of Labor subsequently proposed civil penalty assessments of $5,000 and $2,500, respectively, for the alleged violations and Capitol challenged the proposed assessments.

B. Lozano's Accident

On March 15, 1995, shift supervisor Arthur Lozano was injured when he got caught in a conveyor belt while attempting to align, or "train," the belt. 19 FMSHRC at 536. Lozano removed the safety guard from the belt's head pulley, and directed general laborer Jeff Miller, who was working nearby, to observe him, stating: "Come here, I want to show you a trick." *Id.*; Tr. 47, 121, 129, 143. Then, with Miller standing a few feet away, Lozano held a roll of duct tape and, with his hands between the energized head pulley and the belt, touched the tape to the head pulley where it proceeded to unroll. 19 FMSHRC at 536; Tr. 143-44. When Lozano tried to tear the tape, however, it did not tear and he was pulled into the head pulley. 19 FMSHRC at 536; Tr. 144. Miller went to deenergize the belt, hollering to another employee standing beside the power switch who turned it off. *Id.* Lozano sustained injuries to his hand and arm. 19 FMSHRC at 536; Tr. 32, 144.

Subsequently, while conducting a regular inspection, Inspector Skvarch learned of the accident. 19 FMSHRC at 536; Tr. 31-32. As the result of an accident investigation, Inspector Skvarch issued Capitol Citation No. 4294714, pursuant to section 104(d)(1) of the Mine Act, alleging an S&S and unwarrantable violation of section 56.12016 for Lozano's failure to deenergize equipment before doing mechanical work. 19 FMSHRC at 536; Gov't Ex. 3. The Secretary proposed a civil penalty assessment of $3,000 for the alleged violation and Capitol challenged the proposed assessment.

C. Judge's Decision

[4] The S&S terminology is taken from section 104(d)(1) of the Mine Act, 30 U.S.C. § 814(d)(1), which distinguishes as more serious any violation that "could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard."

On October 26, 1995, prior to the hearing, Capitol filed a motion to stay Docket Nos. WEVA 95-194-M and WEVA 95-221-M until possible criminal charges against Bonfili were resolved. On October 27, 1995, the judge stayed those dockets pending MSHA's completion of its related criminal investigation. On August 7, 1996, the judge lifted the stay in the two dockets involving Bonfili, as well Docket No. WEVA 95-321-M. On October 15, 1996, Capitol filed a motion to dismiss all three dockets based, in part, on MSHA's delay in bringing a criminal case against Bonfili or its failure to state that it would not do so, and its expectation that Bonfili would assert his Fifth Amendment privilege against self-incrimination if called to testify. On October 16, 1996, the judge denied the motion. On October 30, 1996, the judge conducted the hearing, at which Bonfili asserted his Fifth Amendment privilege. Tr. 95-97. Capitol's counsel then stated "we object for having to go forward at this time," asserting that Bonfili's testimony would assist it in defending the case. Tr. 97. We construe this objection as a renewed motion for a further stay of the hearing. However, after the judge learned that Capitol could provide other witnesses who could testify to what Bonfili had told them about the accident, and who could testify that Capitol had trained Bonfili, he implicitly overruled the objection. Tr. 97-98 (directing Capitol to "[g]o ahead"). On February 28, 1997, the judge held oral argument to clarify the legal theories presented by the parties in their post-hearing briefs.[5]

In his decision dated March 7, 1997, the judge noted that Capitol did not dispute the S&S violations but contested the unwarrantable failure allegations and the proposed penalties. 19 FMSHRC at 534. The judge concluded that all three violations resulted from Capitol's unwarrantable failure to comply with the standards. *Id.* at 534, 537. Regarding Bonfili's violation of section 56.12016, the judge found that, based on Capitol's training records, it was reasonable to infer that Bonfili knew that deenergizing the crane alone would not also deenergize the rail. *Id.* at 534. He further found that Bonfili failed to lock out any of the power sources. *Id.* The judge determined that the violation was obvious, extremely dangerous, and committed by a shift supervisor who is held to a high standard of care. *Id.* Regarding Bonfili's violation of section 56.15005, the judge found that, again based on Capitol's training records, it was

[5] On September 17, 1996, the Secretary proposed a civil penalty assessment of $500 against Bonfili, pursuant to section 110(c) of the Mine Act, 30 U.S.C. § 820(c), alleging that he knowingly authorized the violations. WEVA 97-5-M, Proposed Assessment. Bonfili challenged the proposed assessment. WEVA 97-5-M, Contest of Civil Penalties. On February 10, 1997, the Secretary filed a motion to withdraw the petition for assessment of civil penalty. WEVA 97-5-M, Mot. to Withdraw. On February 21, 1997, Judge Melick granted the motion and dismissed the section 110(c) case. WEVA 97-5-M, Order of Dismissal.

reasonable to infer that Bonfili knew that failing to use a safety belt was a violation. *Id.* In assessing civil penalties for the violations, the judge imputed Bonfili's negligence to Capitol, determining that the defense established in *Nacco Mining Co.*, 3 FMSHRC 848 (Apr. 1981), was inapplicable because Bonfili not only placed himself at risk of injury, but also exposed Cook to risk. *Id.* at 534-35. The judge found that by running along the craneway to deenergize the rail, Cook was exposed to the hazard of falling and suffering potentially fatal injuries. *Id.* at 535. He also inferred that, had Bonfili fallen off the craneway, Cook could have attempted to rescue him, thereby exposing himself to a falling hazard with potentially fatal consequences. *Id.* However, the judge found that Capitol's conscientious hiring practices, training program, and safety rules were mitigating circumstances. *Id.* at 535. Thus, the judge assessed civil penalties of $2,500 and $1,250. *Id.*

With regard to Lozano's violation of section 56.12016, the judge found that "it shows reckless disregard to do what [Lozano] did here." *Id.* at 537. The judge determined that the violation was obvious, dangerous, and committed by a shift supervisor who is held to a high standard of care. *Id.* In assessing the civil penalty for the violation, the judge imputed Lozano's negligence to Capitol, determining that the *Nacco* defense was inapplicable based on an inference that, had Lozano become further entangled in the belt, Miller might have attempted to rescue him, exposing himself to the hazard of the moving belt and suffering potentially serious injuries. *Id.* However, the judge found that Capitol's conscientious hiring practices, training program, and safety rules were mitigating circumstances. *Id.* Thus, the judge assessed a civil penalty of $1,600. *Id.* The Commission granted the petition for discretionary review subsequently filed by Capitol challenging these determinations.

II.

Disposition

A. Due Process

Capitol argues that the judge denied it due process by requiring it to go forward after Bonfili asserted the Fifth Amendment privilege and refused to testify. PDR at 11-13; Reply Br. at 2-5. The Secretary responds that, although Bonfili asserted the Fifth Amendment privilege, the judge did not violate Capitol's due process rights by conducting the hearing. S. Br. at 9-12.

The Due Process Clause of the Fifth Amendment guarantees that no person shall "be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V. The fundamental requirement of procedural due process is the opportunity to be heard "at a meaningful time and in a meaningful manner" appropriate to the nature of the case. *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976); *Boddie v. Connecticut*, 401 U.S. 371, 378 (1971); *Goldberg v. Kelly*, 397 U.S. 254, 267 (1970) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)). The timing and manner of the hearing depend upon "appropriate accommodation of the

competing interests involved." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 434 (1982) (quoting *Goss v. Lopez*, 419 U.S. 565, 579 (1975)).

While a judge may stay a civil proceeding pending the outcome of a parallel criminal prosecution, such action is not required by the Constitution. *SEC v. Dresser Indus., Inc.*, 628 F.2d 1368, 1375 (D.C. Cir.), *cert. denied*, 449 U.S. 993 (1980). *See generally United States v. Kordel*, 397 U.S. 1 (1970). In *Kordel*, the Supreme Court rejected the defendants' claim that the use of the civil discovery process in a Food and Drug Administration proceeding to compel answers to interrogatories that could be used to build the prosecution's case in a parallel criminal proceeding was so unfair as to require reversal of the criminal convictions. The Court recognized the "[i]t would stultify enforcement of federal law to require a government agency . . . invariably to choose either to forgo recommendation of a criminal prosecution once it seeks civil relief, or to defer civil proceedings pending the ultimate outcome of a criminal trial." 397 U.S. at 11 (footnote omitted).

Capitol has not cited any case in which a court or agency was found to have violated the Due Process Clause by declining to stay a civil proceeding despite the anticipated assertion of the privilege against self-incrimination by a prospective witness. In the absence of circumstances "in which the nature of the proceedings demonstrably prejudices substantial rights of the investigated party or of the government," parallel proceedings should not be prohibited. *Dresser*, 628 F.2d at 1377 (citing *Kordel*, 397 U.S. at 11-13).

The decision whether to stay a civil proceeding until completion of a criminal prosecution is within the judge's discretion, and review of that decision is generally based on an inquiry as to whether it constituted an abuse of discretion. *Buck Creek Coal Inc.*, 17 FMSHRC 500, 503 (Apr. 1995). Here, however, Capitol has raised a due process challenge to the judge's decision to lift the stay. As in *Buck Creek*, where the operator argued that a blanket stay denied it due process (17 FMSHRC at 501), we apply the test for abuse of discretion, as the relevant factors for this analysis are almost identical to those used by courts in applying a due process analysis to determine whether the granting or lifting of a stay was proper. *See, e.g., Keating v. Office of Thrift Supervision*, 45 F.3d 322 (9th Cir. 1995).[6] For both claims, "[i]n essence, the test is one of balancing equities." *See In re Phillips, Beckwith & Hall*, 896 F. Supp. 553, 558 (E.D. Va. 1995).

[6] In *Keating*, the plaintiff claimed that his due process rights were violated when the Office of Thrift Supervision ("OTS") refused to stay its civil proceeding until the conclusion of state and federal criminal proceedings, because the pending criminal case forced him to invoke his Fifth Amendment privilege during the OTS hearing, depriving him of the opportunity to present testimony on his own behalf. 45 F.3d at 324-25. The Court found no violation of due process and no abuse of discretion, applying the factors set out in *Federal Savings & Loan Insurance Corp. v. Molinaro*, 889 F.2d 899 (9th Cir. 1989), in which the Ninth Circuit reviewed a district court decision to refuse to stay a civil proceeding using an abuse of discretion analysis. *Id.* The *Keating* Court considered the extent to which the defendant's Fifth Amendment rights were implicated, and applied the following additional factors: "(1) the interest of the plaintiffs in

In *Buck Creek*, the Commission set forth the following factors that are appropriate for consideration in determining whether a request for stay based on possible criminal prosecution should be granted:

> (1) the commonality of evidence in the civil and criminal matters (*see Peden v. United States*, 512 F.2d 1099, 1103 (Ct. Cl. 1975), civil proceedings properly stayed if they "churn over the same evidentiary material" as the criminal case); (2) the timing of the stay request (*see Campbell v. Eastland*, 307 F.2d 478, 487-88 (5th Cir. 1962), *cert. denied*, 371 U.S. 955 (1963), imminence of indictment favors limiting scope of discovery or staying proceedings); (3) prejudice to the litigants (*see Peden*, 512 F.2d at 1103-04, failure to show prejudice undercuts claim that stay was improper; *Campbell*, 307 F.2d at 487-88, discovery that prejudices criminal matter may be restricted); (4) the efficient use of agency resources (*see Molinaro*, 889 F.2d at 903, including among stay factors "efficient use of judicial resources" in case involving defendant's request for stay); and (5) the public interest (*see Scotia* [*Coal Mining Co.*, 2 FMSHRC 633, 635 (Mar. 1980)], noting "the public interest in the expeditious resolution of penalty cases").

17 FMSHRC at 503.

Applying these criteria in this case, we conclude that the judge did not abuse his discretion. In deciding to lift the stay order and conduct the hearing, he properly accommodated the competing interests involved by evaluating the prejudice to Capitol that would result from going forward without Bonfili's testimony, versus the adverse impact on the public interest that

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proceeding expeditiously with this litigation or any particular aspect of it, and the potential prejudice to plaintiffs of a delay; (2) the burden which any particular aspect of the proceedings may impose on defendants; (3) the convenience of the court in the management of its cases, and the efficient use of judicial resources; (4) the interests of persons not parties to the civil litigation; and (5) the interest of the public in the pending civil and criminal litigation." *Id.* These criteria are subsumed almost completely in the *Buck Creek* "abuse of discretion" standard set forth below.

would result from further delay. *See Keating*, 45 F.3d at 326 (public interest in a speedy resolution of the case and the agency's concern for efficient administration would have been hampered if proceeding had been stayed). The record indicates that these civil penalty proceedings were stayed for almost a year. In denying Capitol's pre-hearing motion to dismiss, the judge stated that "due to the age of these cases, a further continuance is inappropriate." Unpublished Order dated Oct. 16, 1996.

Additionally, in overruling Capitol's objection at the hearing, the judge considered the fact that Capitol could provide other witnesses to testify regarding what Bonfili had told them about the accident and the training that Capitol had provided to Bonfili.[7] Tr. 97-98. In fact, Capitol provided four such witnesses (Gess, Tr. 70-81; Wolschleger, Tr. 100-10; Cottrell, Tr. 119-21, 123-25; Alexander, Tr. 127-28, 131-34, 136).[8] Thus, Capitol has not convinced us that its inability to question Bonfili resulted in substantial prejudice.

Although the judge did not address the other *Buck Creek* factors, the record discloses that only one of the three remaining factors, the timing of the stay request, comes into play here, and that factor supports the judge's lifting of the stay.[9] The Secretary represented that there had been

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[7] In Commission proceedings, hearsay evidence is admissible so long as it is material and relevant. 29 C.F.R. § 2700.63(a); *REB Enterprises, Inc.*, 20 FMSHRC 203, 206 (Mar. 1998); *Mid-Continent Resources, Inc.*, 6 FMSHRC 1132, 1135 (May 1984).

[8] The judge correctly took into account the compelling fact that other witnesses could provide the testimony that Bonfili, because of his Fifth Amendment assertion, could not. In *United States v. Lot 5, Fox Grove, Alachua County, Florida*, 23 F.3d 359 (11th Cir. 1994), for example, the court, in the context of a forfeiture case (in which the question of staying civil proceedings until the completion of a related criminal matter arises frequently), held that:

> Claimant's assertion that only her own testimony could vindicate her is groundless; other participants to the illegal acts that gave rise to the forfeiture were available to testify at trial. Claimant's failure to indicate with precision why she did not use other parties' testimony to substantiate her defense was fatal. As a result, Claimant's basis for a stay was nothing more than a blanket assertion of the privilege against self-incrimination, which . . . is an inadequate basis for a stay.

Id. at 364.

[9] Because there was no criminal proceeding before or at the time of the hearing, and remote likelihood of an indictment in the future, the factor of commonality of evidence in the civil and criminal matters is not applicable. Similarly, the efficient use of agency resources is irrelevant here, given the absence of concurrent agency proceedings or anticipated judicial decisions that might affect the administrative litigation.

no criminal investigation into the matter and, thus, it had not been referred to the U.S. Attorney for criminal prosecution. Tr. 93; *see also* Oral Arg. Tr. 35. This reduced the need for a reimposition of the stay. *See Dresser*, 628 F.2d at 1375-76 (need for stay was reduced because no indictment had been returned).

The basis for Bonfili's invocation of the privilege against self-incrimination was the possibility of criminal prosecution absent a grant of immunity from the U.S. Attorney. *See* Tr. 93; Oral Arg. Tr. 37-38. A stay continued on this basis alone, as the operator essentially requests, could be indefinite, as there is presumably small likelihood that a person whom the Department of Labor does *not* refer to the U.S. Attorney will nevertheless receive a grant of immunity. As the *In re Phillips* court noted, staying a civil case until there is no threat of criminal prosecution is problematic because "it is sometimes difficult to tell when, if ever, the possibility of criminal prosecution has passed." 896 F. Supp. at 557 n.4.

Based on the foregoing, we conclude that Capitol was afforded a meaningful opportunity to confront the evidence that was presented against it in this case and, therefore, was not denied due process. In light of the public interest in the expeditious resolution of penalty cases, and Capitol's ability to provide other witnesses to testify regarding what Bonfili had told them about the accident and Capitol's training of Bonfili, we conclude that the judge did not abuse his discretion in declining to stay the case further and conducting the hearing although Bonfili asserted the Fifth Amendment privilege.

B. Unwarrantable Failure

Capitol argues that substantial evidence does not support the judge's determination that Bonfili's conduct was unwarrantable. PDR at 14-17; Reply Br. at 5-7. It asserts that the judge imposed a strict liability standard for unwarrantable failure violations committed by supervisory personnel. PDR at 17-19; Reply Br. at 7-8. The Secretary responds that substantial evidence supports the judge's determination and that he did not impose a strict liability standard for supervisors. S. Br. at 13-19.

The unwarrantable failure terminology is taken from section 104(d) of the Mine Act, 30 U.S.C. § 814(d), and refers to more serious conduct by an operator in connection with a violation. In *Emery Mining Corp.*, 9 FMSHRC 1997 (Dec. 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Id.* at 2001. Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Id*. at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991) ("*R&P*"); *see also Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 136 (7th Cir. 1995) (approving Commission's unwarrantable failure test). The Commission has recognized that a number of factors are relevant in determining whether a violation is the result of an operator's unwarrantable failure, such as the extensiveness of the violative condition, the length of time that it has existed, the

operator's efforts to eliminate the violative condition,[10] and whether the operator has been placed on notice that greater efforts are necessary for compliance. *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992). The Commission has also considered whether the violative condition is obvious or poses a high degree of danger. *Midwest Material Co.*, 19 FMSHRC 30, 34-35 (Jan. 1997) (finding foreman's negligent conduct in the face of an obvious and dangerous hazard indicates a "serious lack of reasonable care"); *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1243-44 (Aug. 1992) (finding unwarrantable failure where unsaddled beams "presented a danger" to miners entering area); *Warren Steen Constr., Inc.*, 14 FMSHRC 1125, 1129 (July 1992) (finding violation aggravated and unwarrantable based on "common knowledge that power lines are hazardous, and . . . that precautions are required when working near power lines with heavy equipment"); *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1988) (finding unwarrantable failure where roof conditions were "highly dangerous"); *Kitt Energy Corp.*, 6 FMSHRC 1596, 1603 (July 1984) (conspicuous nature of the violative condition supports unwarrantable failure finding).

We conclude that substantial evidence[11] supports the judge's determination that Bonfili's failure to deenergize the rail and wear a safety belt constituted aggravated conduct. We agree with the judge that both violations were obvious and dangerous. 19 FMSHRC at 534. The record contains ample evidence that Bonfili had been trained to deenergize and lock out the crane and wearing a safety belt while working on the crane rails. Tr. 65-73, 75, 100-07, 115-18, 136; C. Exs. 5, 6, 10. It is undisputed that, despite his training, Bonfili began working on the craneway after directing Cook to deenergize the crane only and failing to lock out any of the power sources to the crane. 19 FMSHRC at 534. In addition, it is undisputed that Bonfili failed to wear a safety belt while working on the craneway, where there was a danger of falling. *Id.* Based on evidence that Bonfili had received safety training, we conclude that the judge reasonably inferred that Bonfili knew that deenergizing the crane alone would not also deenergize the rail, and that Bonfili knew that the failure to use a safety belt was dangerous. 19 FMSHRC at 534.[12] The Commission has emphasized that inferences drawn by a judge are

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[10] In considering the operator's efforts to eliminate the violative condition, the Commission focuses on compliance efforts made prior to the issuance of a citation or order. *Enlow Fork Mining Co.*, 19 FMSHRC 5, 17 (Jan. 1997).

[11] When reviewing an administrative law judge's factual determinations, the Commission is bound by the terms of the Mine Act to apply the substantial evidence test. 30 U.S.C. § 823(d)(2)(A)(ii)(I). "Substantial evidence" means "'such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion.'" *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

[12] We disagree with Capitol that the judge drew negative inferences based on Bonfili's assertion of the Fifth Amendment privilege against self-incrimination. PDR at 17; Reply Br. at 7. At the post-hearing oral argument, the judge expressly found it inappropriate to make a negative inference based on Bonfili's refusal to testify (Oral Arg. Tr. 50) and, in his decision, the

"permissible provided they are inherently reasonable and there is a logical and rational connection between the evidentiary facts and the ultimate fact inferred." *Mid-Continent*, 6 FMSHRC at 1138. Accordingly, we conclude that the obviousness of Bonfili's violations and the high degree of danger posed support the judge's unwarrantable failure finding.

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judge did not mention Bonfili's assertion of privilege.

In addition, the judge properly recognized that a high standard of care was required of Bonfili, who was a shift supervisor. 19 FMSHRC at 534 (citing *Midwest Materials*, 19 FMSHRC at 35 ("a foreman . . . is held to a high standard of care")). The Mine Act places primary responsibility for maintaining safe and healthful working conditions in mines on operators, with the assistance of their miners. 30 U.S.C. § 801(e). "Managers and supervisors in high positions must set an example for all supervisory and non-supervisory miners working under their direction. Such responsibility not only affirms management's commitment to safety but also, because of the authority of the manager, discourages other personnel from exercising less than reasonable care." *Wilmot Mining Co.*, 9 FMSHRC 684, 688 (Apr. 1987). As a supervisor, Bonfili had been entrusted with augmented safety responsibility and was obligated to act as a role model for Cook, a subordinate, who was watching him. Thus, we conclude that, as a supervisor, Bonfili's failure to deenergize the rail and wear a safety belt in the face of obvious and dangerous hazards further supports the judge's unwarrantable failure finding.[13]

It is well established that a supervisor's violative conduct, which occurs within the scope of his employment, may be imputed to the operator for unwarrantable failure purposes. *R&P*, 13 FMSHRC at 194-97. Here, Bonfili was acting as Capitol's agent when responding to Cook's safety concern. Citing *Nacco*, 3 FMSHRC at 849-50, Capitol asks the Commission to vacate the Secretary's unwarrantable failure determination in light of Capitol's conscientiousness in providing Bonfili with safety training. PDR at 18-22. In *Nacco*, the Commission declined to impute a supervisor's negligence to the operator for the purpose of assessing civil penalties because it had taken reasonable steps to avoid an accident and the supervisor's conduct did not expose other miners to risk of injury. 3 FMSHRC at 850. In this case, the judge determined that the *Nacco* defense was unavailable to mitigate Capitol's negligence for the purpose of assessing

[13] Commissioner Verheggen criticizes us for focusing on the obvious and dangerous nature of Bonfili's violations and his status as a supervisor, and not relying on the extent of the violative condition, the length of time that it had existed, whether the operator had been placed on notice that greater efforts were necessary for compliance, and the operator's efforts in abating the violative condition. Slip op. at 16-17. Consistent with Commission precedent on unwarrantable failure, we apply only those factors that are relevant to the facts of this case. *See Lafarge Constr. Materials*, 20 FMSHRC 1140, 1147 (Oct. 1998) (holding that for violations involving high danger of which a foreman should have been aware, other factors may be less relevant).

civil penalties because Bonfili's and Lozano's violations did expose additional miners to a risk of injury. 19 FMSHRC at 535, 537. We conclude that the defense is unavailable for a different reason ― we decline to extend the *Nacco* defense to violations that are the result of unwarrantable failure pursuant to section 104(d) of the Mine Act.

The *Nacco* defense has been applied sparingly, in narrowly restricted circumstances. Contrary to Capitol's assertion (PDR at 19), the Commission has never applied the *Nacco* defense to allow an operator to avoid a finding of unwarrantable failure under section 104(d). In *R&P*,[14] the only case decided by the Commission in which the defense was invoked by an operator under such circumstances, the Commission held that the misconduct of a mine examiner, acting within the scope of his employment, was properly imputable to the operator for the purpose of assessing whether the operator had unwarrantably failed to comply with a regulation. *Id.* at 194-97. Although the Commission found *Nacco* inapplicable because the violation at issue in *R&P* put miners at risk, we also noted, in dictum, that R&P had not advanced "any convincing reasons why *Nacco* should be expanded to include unwarrantable failure." *Id.* at 198.

The *Nacco* defense represents an exception to the common law rule that a principal is liable for actions committed by an agent acting within the scope of his apparent authority. *See Ambrosia Coal & Constr. Co.*, 18 FMSHRC 1552, 1561 n.12 (Sept. 1996) (citing 3 Am. Jur. 2d *Agency* §§ 78, 79 (1986)). As the Commission has noted, "operators typically act in the mines only through . . . supervisory agents." *Southern Ohio Coal Co.*, 4 FMSHRC 1459, 1463-64 (Aug. 1982).[15] Thus, extending *Nacco* to section 104(d) citations or orders could create a potentially large loophole for operators charged with unwarrantable conduct that could ultimately

[14] *R&P* involved two withdrawal orders issued pursuant to section 104(d)(2) of the Mine Act, 30 U.S.C. § 814(d)(2), alleging S&S and unwarrantable violations of 30 C.F.R. § 75.305, a mandatory underground coal mine safety standard requiring weekly examinations for hazardous conditions in specified areas of mines. 13 FMSHRC at 189-91.

[15] Of course, not all actions of a supervisor may be imputed to an operator, notwithstanding Commissioner Verheggen's concern that an employer's conduct might now be deemed unwarrantable "[n]o matter how unforeseeable, irrational, or 'inexplicably reckless' a supervisor's actions might be." Slip op. at 18 (citation omitted). In his dissent, Commissioner Verheggen raises a hypothetical involving a violation stemming from a supervisor's suicide. *Id.* He suggests that, as a result of our decision, this violation would be impossible to defend against a charge of unwarrantable failure. *Id.* The dissent is wrong. Consistent with *R&P*, the operator in such a case could defend on the grounds that the supervisor's actions were outside the scope of his employment. *R&P*, 13 FMSHRC at 196. As a leading commentator has explained, "[i]f [the employee] has no intention, not even in part, to perform any service for the employer, but intends only to further a personal end, his act is not within the scope of the employment." W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 70, at 503 (5th ed. 1984) (footnote omitted).

undermine the significance of that important mechanism for deterring aggravated violations of the Mine Act.[16] Accordingly, we will not allow the *Nacco* defense where, as here, the supervisor's conduct results in an unwarrantable violation under section 104(d) of the Mine Act, regardless of whether that conduct exposes other miners to risk.[17]

[16] Commissioner Verheggen suggests that, as a result of our refusal to extend the *Nacco* defense to violations that are the result of unwarrantable failure, operators may perceive a disincentive to take extra precautions in training miners if such precautions cannot be used to prove their lack of recklessness. Slip op. at 19. This view supposes that operators only train their employees in order to avoid liability, and not to avoid injuries and accidents.

[17] We are troubled by a doctrine that exonerates an operator from responsibility for the negligent conduct of a supervisor who endangers only himself. It suggests that protecting the safety of supervisory personnel is a less significant concern under the Mine Act. But under section 3(g) of the Mine Act, 30 U.S.C. § 802(g), supervisors as well as rank-and-file employees may be "miners," whose safety and health is a preeminent statutory concern. In our view, it makes little sense to resolve the question of whether a supervisor's negligent conduct is properly imputable to an operator based on the fortuity of whether such conduct also exposes other miners to the risk of injury.

In conclusion, Bonfili's inexplicably reckless conduct is the kind of "serious lack of reasonable care" that constitutes unwarrantable failure. *See Midwest Materials*, 19 FMSHRC at 35-36 (experienced mine foreman's unexplained failure to follow safety procedures was "lapse of judgement or presence of mind . . . [which] qualifies as the type of 'indifference' or 'serious lack of reasonable care' that constitutes unwarrantable failure."). Substantial evidence supports the judge's conclusion that Bonfili's violations resulted from an unwarrantable failure to comply with the standards and we affirm his holding.[18]

C. Civil Penalties

Capitol argues that the *Nacco* defense applies to the violations at issue. However, it appears to confine this contention to the judge's unwarrantable failure determination, and does not explicitly raise a claim that the judge erred in holding that the *Nacco* defense was inapplicable to his determination of Capitol's level of negligence for purposes of his penalty assessment. *See* PDR at 14, 19-24; Reply Br. at 8-11. However, to the extent Capitol's brief can be read to imply a challenge to the judge's rejection of the *Nacco* defense for civil penalty purposes, we address it. Because we hold that the *Nacco* defense does not extend to cases involving unwarrantable failure under section 104(d), it follows that the defense is unavailable to mitigate Capitol's negligence for the purpose of assessing penalties here.[19] We therefore find it unnecessary to pass on whether substantial evidence supports the judge's fact-based determination that *Nacco* does not apply to the violations at issue in this case.

[18] Contrary to the suggestion of Commissioner Verheggen (slip op. at 18), we are not adopting a presumption of unwarrantable failure in this case.

[19] We disagree with Commissioner Verheggen's suggestion that we have "overturn[ed] *Nacco* as it formerly applied to penalties assessed for unwarrantable violations." Slip op. at 22. As indicated above, there is no reported decision in which the Commission has applied *Nacco* to reduce the penalty assessed for an unwarrantable violation.

Finally, in determining civil penalties under the Mine Act, the judge must make "[f]indings of fact on each of the [section 110(i)] criteria[20] [to] not only provide the operator with the required notice as to the basis upon which it is being assessed a particular penalty, but also provide the Commission and the courts . . . with the necessary foundation upon which to base a determination as to whether the penalties assessed by the judge are appropriate, excessive, or insufficient." *Sellersburg Stone Co.*, 5 FMSHRC 287, 292-93 (Mar. 1983), *aff'd*, 736 F.2d 1147. In this case, the judge, while stating that he "[c]onsider[ed] all the criteria under section 110(i) of the Act" (19 FMSHRC at 535), only made express findings concerning the negligence and gravity criteria. *See id.* at 535, 536, 537. However, there is undisputed evidence in the record concerning the remaining penalty criteria.[21] Therefore, in the interest of judicial economy and

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[20] Section 110(i) of the Mine Act provides in pertinent part:

> The Commission shall have authority to assess all civil penalties provided in this Act. In assessing civil monetary penalties, the Commission shall consider [1] the operator's history of previous violations, [2] the appropriateness of such penalty to the size of the business of the operator charged, [3] whether the operator was negligent, [4] the effect on the operator's ability to continue in business, [5] the gravity of the violation, and [6] the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

30 U.S.C. § 820(i).

[21] Based on undisputed evidence in the record, we find that Capitol was a medium size operator with a total annual tonnage of 495,885 production tons and 354,287 tons for this mine. Tr. 54-57; Gov't Ex. 5. We also find that in the 3 years preceding the issuance of the most recent citation at issue, Capitol had been charged with 88 violations. Tr. 54; Gov't Ex. 4. With respect to Capitol's good faith in attempting to achieve rapid compliance, we find that on October 25, 1994, the same date the relevant citation and order were issued, Bonfili, while still hospitalized, was reinstructed on the appropriate procedures for locking out and de-energizing equipment and the need to wear a safety belt and line in appropriate circumstances. Tr. 80; Gov't Exs. 1 at 1, 2 at 1. In addition, the judge found that Capitol gave Bonfili a 5-day suspension and written warning for his violations of its safety rules, and advised him that future violations of safety rules would lead to more progressive discipline, including discharge. 19 FMSHRC at 535; Tr. 10-11. We also find that Lozano was reinstructed on the need to lock out equipment 5 minutes after his accident (Gov't Ex. 3 at 1), and that Capitol gave him a 3-day suspension for violating its safety rules. 19 FMSHRC at 537; Tr. 12. Finally, although there was no evidence introduced concerning the "ability to continue in business" criterion, it is well established that in the absence of proof that the imposition of authorized penalties would adversely affect an operator's ability to continue in business, the Commission presumes that no such adverse effect would occur. *Spurlock Mining Co.*, 16 FMSHRC 697, 700 (Apr. 1994); *Sellersburg*, 5 FMSHRC at 294.

based upon the circumstances presented here, we see no need to remand the judge's penalty assessments for additional findings. Our decision in this case should not, however, be construed as an indication that in future cases we will not require strict compliance by our judges with *Sellersburg*, and remand when necessary for the requisite findings concerning all of the penalty criteria.

III.

Conclusion

For the foregoing reasons, we reject Capitol's due process claim and affirm the judge's findings of unwarrantable failure and his penalty assessments.

Mary Lu Jordan, Chairman

Marc Lincoln Marks, Commissioner

Robert H. Beatty, Jr. Commissioner

Commissioner Verheggen, concurring in part and dissenting in part:

I concur with Part II.A of the majority opinion. I disagree, however, with the majority's conclusion that the judge properly found that Capitol Cement's violations of sections 56.12016 and 56.15005 were unwarrantable. To the contrary, I find the judge's unwarrantable failure analysis deficient as a matter of law, and I would vacate and remand the matter to him accordingly, including instructions to reconsider his penalty assessment based on any new findings regarding the operator's negligence. I would also vacate and remand all three of the judge's penalty assessments because he failed to properly consider the factors listed in section 110(i) of the Mine Act. I also disagree with the majority's holding that the *Nacco* defense cannot be asserted at all in a case involving an unwarrantable failure violation, and find that the judge properly considered the defense when assessing the three penalties. I find, however, that the judge's application of the defense is not clearly articulated and appears to lack record support. I would thus remand the penalty assessments for the judge to reconsider and more fully explain.

I therefore dissent from Parts II.B and II.C of the majority's opinion.

A. Unwarrantable Failure

In Part II.B of their decision, the majority "decline[s] to extend the *Nacco* defense to violations that are the result of unwarrantable failure." Slip op. at 11. The *Nacco* defense essentially shields an operator, under limited circumstances, from having its agent's negligence imputed to it for purposes of assessing a penalty. In one sense, I agree with the majority: as I explain further below, I do not believe that an operator should be able to assert a *Nacco* defense as an absolute bar to liability for an unwarrantable failure to comply with the Mine Act. But I strongly disagree with the effect of the majority's decision, which is essentially to bar judges from considering evidence on each of the *Nacco* elements (i.e., reasonable steps taken to avoid a particular class of accident and whether the violative conduct at issue exposed other miners to any risk of injury) in determining whether an operator's conduct is unwarrantable. Indeed, since this is precisely what the judge did, I find his unwarrantable failure analysis legally flawed. He failed to consider all the relevant facts and circumstances relating to the level of Capitol's negligence, which I find not only contrary to Commission precedent, but inequitable as well.

The judge's findings of unwarrantable failure are based solely on his consideration of four factors: that Bonfili knew or should have known that his actions were violative, and that "[t]he violation was also obvious, extremely dangerous and committed by a foreman held to a high standard of care." 19 FMSHRC at 534. This approach, which is endorsed by the majority, is at odds with Commission precedent, under which our judges must look at all the relevant facts and circumstances of a case when determining whether a violation is unwarrantable,[1] including the

[1] *See Jim Walter Resources, Inc.*, 21 FMSHRC 740, 745 (July 1999) (remanding case to judge for full consideration of facts and circumstances relevant to unwarrantable failure determination).

extent of the violative condition, the length of time that it has existed, whether the violation is obvious or poses a high degree of danger, whether the operator has been placed on notice that greater efforts are necessary for compliance, the operator's efforts in abating the violative condition, and the operator's knowledge of the existence of the violation. *See Cyprus Emerald Resources Corp.*, 20 FMSHRC 790, 813 (Aug. 1998); *Midwest Materials Co.*, 19 FMSHRC 30, 34 (Jan. 1997); *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992); *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1988); *Kitt Energy Corp.*, 6 FMSHRC 1596, 1603 (July 1984). It thus stands to reason that proving the elements of a *Nacco* defense should not be an absolute defense to an unwarrantable failure allegation, since this would preclude the Commission from considering any other facts and circumstances surrounding a particular violation.

The body of Commission law on unwarrantable failure clearly stands for the proposition that we must consider *all* facts and circumstances relevant to determining an operator's negligence, and whether any such negligence rises to the level of aggravated conduct, *including exculpatory as well as incriminatory evidence*. Here, the operator introduced exculpatory evidence as to (1) the extent of the violative condition by alleging that Bonfili's actions placed no one else in harm's way, and (2) Capitol's good faith efforts to be in constant compliance and to avoid the sort of accident that occurred here, as evidenced by what the judge found to be their "responsible training program," as well as the company's work rules and measures taken to discipline Bonfili (19 FMSHRC at 535).

The judge failed to consider this exculpatory evidence in his unwarrantable failure analysis, but did consider it when he assessed penalties for the two violations committed by Bonfili. This makes no sense. I find absurd the notion that evidence tending to prove or disprove negligence and aggravated conduct can somehow change character and become relevant or not based on the statutory rubric under which it is considered.[2] I fail to see how a company can be found to have engaged in aggravated conduct (i.e., high negligence) under section 104(d), but at the same time be found to have been less negligent for purposes of assessing a penalty.

My colleagues in the majority also fail to consider all the relevant facts and circumstances of this case in their unwarrantable failure analysis. While they mention several "factors" in their recitation of the law (slip op. at 9), by their own admission they ignore the exculpatory evidence adduced by Capitol, focussing instead exclusively on "the obvious and dangerous nature of

[2] I note that nothing in sections 104(d) and 110(i) of the Mine Act suggests that analyses of an operator's negligence under each section should be somehow different, or should focus solely on aggravating factors to the exclusion of any facts and circumstances tending to mitigate the operator's level of negligence. *See* 30 U.S.C. §§ 814(d), 820(i).

Bonfili's violation and his status as a supervisor." Slip op. at 11 n.13. *Cf. Lafarge Constr. Materials*, 20 FMSHRC 1140, 1156 (Oct. 1998) (Comm'r Verheggen, dissenting) ("The majority . . . fails to apply the Commission's traditional unwarrantable failure test. Instead, . . . they collapse the test into a single dispositive factor: whether a "high degree of danger [is] posed by a violation."). In support of its approach, the majority states, "we apply only those factors that are relevant to the facts of this case." Slip op. at 11 n.13 (citing *Lafarge*). I fail to see how the exculpatory evidence here is not relevant to determining the level of Capitol's negligence.

Under the majority's ruling, judges will look only to incriminatory evidence, and will be excluded from considering exculpatory evidence capable of being pigeon-holed under the *Nacco* defense. I find this result singularly inappropriate and inequitable. The majority's holding essentially precludes operators from mounting any defense to allegations of unwarrantable failure based upon either of the *Nacco* elements. No matter how unforeseeable, irrational, or "inexplicably reckless" (slip op. at 13) a supervisor's actions might be, his employer's conduct will now be characterized as "aggravated conduct constituting more than ordinary negligence," "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care" — even if the operator has taken every reasonable step possible to avoid such conduct and even if the conduct imperils only the supervisor. Just how unfair the majority's sweeping new rule is can be seen in the simple hypothetical case of a supervisor who apparently commits suicide in a mine in the presence of others who are not placed at risk by the supervisor's act. Let us assume that the supervisor electrocutes himself by intentionally grabbing onto a live wire in violation of any number of the Secretary's regulations, and that the operator has in effect an extensive training program aimed specifically at avoiding electrocution. Under the majority's new rule, if the Secretary's allegation of unwarrantable failure in this hypothetical case[3] came before a judge, he or she would be precluded when ruling on this allegation from considering evidence that the supervisor may have committed suicide, that his act placed no one else at risk, or that the operator took every reasonable measure to avoid such an incident. The majority may as well announce that, henceforth, any violation with any resemblance to my hypothetical — or even to the facts of this case — will be considered to be presumptively unwarrantable.

[3] It appears that the Secretary operated under a theory similar to the one I posit here when she assigned special investigators to probe Bonfili's accident. He was charged under section 110(c) with *intentional*, aggravated misconduct for disregarding safety standards. *See* slip op. at 4 n.5. Even though the Secretary ultimately dropped this charge (*id.*), such an allegation, along with the Secretary's refusal to rule out criminal (i.e., wilful) charges from the beginning, could only have been predicated upon a theory that Bonfili deliberately acted to hurt himself.

The majority raises the alarums that extending *Nacco* to unwarrantable cases will "exonerate[] an operator from responsibility for the negligent conduct of a supervisor who endangers only himself." Slip op. at 12 n.17. The majority is overstating its case here. Even in my hypothetical case, the operator would be strictly liable for the supervisor's violation, *Asarco, Inc. v. FMSHRC*, 868 F.2d 1195 (10th Cir. 1989), under which regime it would be well within the judge's discretion to adjust the penalty assessed to account for the gravity of the violation. In no way would reliance upon *Nacco* evidence to mitigate an operator's unwarrantable failure somehow "exonerate" operators or place less significance on the safety of supervisory personnel. Instead, I do not believe that an operator should be penalized for doing everything within its power to avoid a particular type of accident when such an accident unexpectedly and unforeseeably occurs due to the irrational act of one of its agents. Indeed, I believe that under the majority's holding, operators could unfortunately perceive a disincentive to take extra precautions in the training of their workers if such extra precautions cannot be used to prove their lack of recklessness. As the Commission stated in *Nacco*:

> Where as here, an operator has taken reasonable steps to avoid a particular class of accident and the erring supervisor unforseeably exposes only himself to risk, it makes little enforcement sense to penalize the operator for "negligence." *Such an approach might well discourage pursuit of a high standard of care because regardless of what the operator did to insure safety, a negligence finding would automatically result*.

3 FMSHRC at 850 (emphasis added). I would regret that any pronouncement by this Commission might discourage operators from being as careful as Capitol apparently was in this instance.

Nor do I find credible the majority's alarum that "extending *Nacco* to section 104(d) citations or orders could create a potentially large loophole for operators . . . that could ultimately undermine the significance of that important mechanism for deterring aggravated violations of the Mine Act." Slip op. at 12. Under my approach, which would require judges to include evidence on each of the *Nacco* elements in weighing allegations of unwarrantable failure, but not to assign the elements dispositive weight, no such loophole would be created. But even if I were in favor of a pure *Nacco* defense to unwarrantable failure, I fail to see how such a defense, which by its very nature could be "applied sparingly, in narrowly restricted circumstances" (slip op. at 11), could ever lead to the dire consequences of which the majority warns. To the contrary, I believe that their ruling, which creates in effect a per se class of unwarrantable violations, waters down the graduated enforcement scheme of the Mine Act under which additional sanctions beyond strict liability are brought to bear against operators whose conduct is aggravated. *See Emery Mining Corp.*, 9 FMSHRC 1997, 2001 (Dec. 1987) ("The Mine Act's use of different terms within the same statute demonstrates that Congress intended the different terms to censure different types of operator conduct within a graduated enforcement scheme."). I find this

particularly true in light of our judges' discretion to impose additional sanctions on particularly grave violations when assessing penalties under section 110(i) of the Act.

I find one other aspect of the majority's opinion particularly troubling. Although they confidently "decline to extend the *Nacco* defense to violations that are the result of unwarrantable failure" (slip op. at 11), I find no indication in the judge's opinion that he ever actually reached, much less analyzed this issue. Nowhere in his opinion does the judge mention the *Nacco* defense in the context of analyzing the Secretary's allegations of unwarrantable failure. Instead, he limits his discussion of *Nacco* to his analysis of Capitol's *negligence*, one of the six statutory factors the Commission must weigh in assessing penalties. 19 FMSHRC at 534-35. Indeed, his discussion of unwarrantable failure is separate and apart from his discussion of negligence. He first states unequivocally that "the Secretary has clearly sustained her burden of proving the necessary aggravating circumstances to justify 'unwarrantable failure' and high negligence." *Id*. at 534. Only then does he turn to addressing Capitol's assertion of the *Nacco* defense, and nowhere in the ensuing discussion does he mention in any relevant sense "unwarrantable failure" or any of the terms normally associated with the concept, such as "aggravated conduct constituting more than ordinary negligence," "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Id*. at 534-35. I find particularly significant that the judge, after finding that Bonfili's actions put crane operator Cook at risk, states that "[i]n assessing a civil penalty herein I do consider, *however*, [Capitol's] training program." *Id*. at 535 (emphasis added). His use of the word "however" clearly indicates that the foregoing discussion relates to penalties, not unwarrantable failure.

The judge did not discuss extension of the *Nacco* defense to unwarrantable failure even though the issue was briefed (S. Post-Hearing Br. at 12-13, C. Post-Hearing Br. at 14-18) and orally argued before him (Oral Arg. Tr. at 8-16, 58-60) by both parties. From this, one could conclude that he rejected sub silentio Capitol's argument that the defense be extended. Insofar as he reached such a conclusion, however, I reject it on the ground that, as explained above, it is at odds with the Commission's traditional approach to unwarrantable failure which considers the totality of facts and circumstances of each case. At any rate, I question the wisdom of using his decision as the basis for as broad and sweeping a pronouncement as the majority makes limiting the *Nacco* defense.

For the foregoing reasons, I would therefore vacate and remand the judge's decision, and would direct him to consider any exculpatory evidence in determining the validity of the Secretary's allegations of unwarrantable failure as to the two violations committed by Bonfili.

Regarding my remand, I would specifically direct the judge to reconsider his finding rejecting Capitol's argument that Bonfili's actions placed no one else at risk (a finding the judge made solely in the context of determining the company's negligence for penalty purposes). I do not believe that this finding is sound. Only one witness (Weber) testified that Bonfili's actions endangered more than one person; in fact, the citations at issue show only one person affected. *See* Gov't Exs. 1 at 1, 2 at 1 (each noting "001" under Section 10.D, "Number of Persons

Affected"). The judge also did not address the evidence contradicting Weber's testimony. Nor did the Secretary introduce any evidence of any actual risk Cook encountered as a result of Bonfili's actions. I am reluctant, however, to reverse the judge's findings given the deferential substantial evidence standard of review under which I must review them. I would thus direct that he reconsider his findings and, at the very least, explain why he apparently credited Weber even though the overwhelming weight of the evidence appears to contradict his testimony.

B. Penalties

In light of my disposition regarding the two violations committed by Bonfili, I would vacate and remand the judge's penalty assessment for reconsideration of the negligence involved. Specifically, although the judge concluded that the *Nacco* defense was inapplicable because he found that Bonfili's violations placed others at risk (19 FMSHRC at 535), I would direct him to reconsider this finding because, as stated above, I believe it may not be supported by the record. I would also direct the judge to make "findings of fact on the statutory penalty criteria," which it is well settled "must be made." *Sellersburg Stone Co.*, 5 FMSHRC 287, 292 (Mar. 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984). Even my colleagues concede that the judge's penalty assessments fail to meet the requirements of *Sellersburg*. Slip op. at 13-14.

I would also vacate and remand the penalty the judge assessed for Lozano's violation of section 56.12016.[4] The judge also concluded that the *Nacco* defense did not apply to this violation because he found that Lozano's actions imperiled others. 19 FMSHRC at 537. I find, however, that the judge drew an unreasonable inference in finding that Lozano's actions exposed Miller to risk of injury based on speculation that, had Lozano become further entangled by the belt, "Miller may then have attempted to extract Lozano from the belt thereby also exposing himself . . . [to] potentially serious injuries." *Id.*

The judge based his inference on testimony given by Weber, who as part of MSHA's accident investigation, interviewed Lozano and Miller. Tr. 155-56. Weber testified that "[i]f Mr. Lozano had been pulled in to the belt in a more serious manner, the possibility that Mr. Miller may have reached up and tried to extricate him from that pulley may have put him in a more serious position of jeopardy himself. . . . If he had reached out and tried to grab Mr. Lozano, he may have been pulled in too." Tr. 156-58. Weber admitted, however, that his opinion on Miller's exposure to harm was purely speculative, and that Miller's actual response was to notify a fellow miner to pull the emergency shut down switch. Tr. 159-60. The judge posited a rescue attempt under circumstances not in the record. Moreover, there is nothing in the record to

[4] The penalty assessed by the judge for Lozano's violation of section 56.12016 gets all but lost in the majority's opinion. I would also note in passing that I find the Secretary's case against Capitol for this violation problematic because it is directly at odds with the decision of the Ninth Circuit in *Phelps Dodge Corp. v. FMSHRC*, 681 F.2d 1189 (9th Cir. 1982). *Cf. James Ray*, 20 FMSHRC 1014, 1024-26 (Sept. 1998). The underlying violation is not, however, at issue in this appeal.

suggest that Miller would have responded by attempting to rescue Lozano in the manner described by Weber.

Thus, I find the judge's inference that Miller might have been injured as a result of a hypothetical rescue attempt not rationally related to the underlying facts. I would therefore reverse the judge's conclusion that the *Nacco* defense was inapplicable here,[5] vacate the judge's penalty assessment, and remand with instructions to apply *Nacco* in mitigation of Capitol's negligence. I would also direct the judge to make the necessary "findings of fact on the statutory penalty criteria" which, again, he neglected to make.

Finally, I must take strong exception to the majority's disposition of the penalties at issue in this appeal. In a sweeping statement, the majority states:

> Because we hold that the *Nacco* defense does not extend to cases involving unwarrantable failure under section 104(d), it follows that the defense is unavailable to mitigate Capitol's negligence for the purpose of assessing a penalty here.

Slip op. at 13. This pronouncement goes far beyond the issue of whether *Nacco* can be asserted as a defense to an allegation of unwarrantable failure and, in one stroke, rules out any operator from asserting *Nacco* as a defense to findings of high negligence serving as the basis for any penalty assessed for an unwarrantable violation. The majority uses this radical departure from long standing Commission precedent as the basis for not reaching the issue of whether substantial evidence supports the judge's findings that the *Nacco* defense did not apply to the three penalties he assessed. *See id.* I am deeply troubled by the majority's holding in which they overturn *Nacco* as it formerly applied to penalties assessed for unwarrantable violations, and I find especially troubling the fact that they announce their holding with little, if any explanation.

Theodore F. Verheggen, Commissioner

[5] The judge essentially held that Capitol established the other *Nacco* element when he found "absence of negligence in Lozano's hiring, the operator's training program, and the fact that Lozano was disciplined." 19 FMSHRC at 537.

Commissioner Riley, dissenting:

I write separately in order to comment on due process questions that yet linger over this case. The question of whether Capitol Cement should have had to go forward to put on its case without Bonfili as a witness is inextricably linked with the granting and subsequent lifting of a stay of the proceeding during the supposed pendency of a criminal investigation.

As the majority states, the question of granting or lifting a stay under such circumstances is within the sound discretion of the judge whose decision on such matters is to be reviewed for abuse of discretion. Drawn from several court cases ─ *SEC v. Dresser Industries, Inc.*, 628 F.2d 1368, 1375 (D.C. Cir. 1980), *U.S. v. Kordel*, 397 U.S. 1 (1970), *Keating v. Office of Thrift Supervision*, 45 F.3d 322 (9th Cir. 1995), *In re Phillips, Beckwith & Hall*, 896 F. Supp. 553, 558 (E.D. VA 1995) and others ─ the applicable test for determining whether a request for a stay based on possible criminal prosecution should be granted (or lifted) was set out by the Commission in *Buck Creek Coal, Inc.*, 17 FMSHRC 500, 503 (Apr. 1995), and contains a comprehensive list of factors the judge must consider:

> (1) the commonality of evidence in the civil and criminal matters (*see Peden v. United States*, 512 F.2d 1099, 1103 (Ct Cl. 1975), civil proceedings properly stayed if they "churn over the same evidentiary material" as the criminal case); (2) the timing of the stay request (*see Campbell v. Eastland*, 307 F.2d 478, 487-88 (5th Cir. 1962), *cert denied*, 371 U.S. 955 (1963), imminence of the indictment favors limiting scope of discovery or staying proceedings); (3) prejudice to the litigants (*see Peden*, 512 F.2d at 1103-04, failure to show prejudice undercuts claim that stay was improper; Campbell, 307 F.2d at 487-88, discovery that prejudices criminal matter may be restricted); (4) the efficient use of agency resources (*see Molinaro*, 889 F.2d at 903, including among stay factors "efficient use of judicial resources" in case involving defendant's request for stay); and (5) the public interest (*see Scotia*, 2 FMSHRC at 635, noting "the public interest in the expeditious resolution of penalty cases").

On the question as to whether the judge complied with the Buck Creek factors, the majority states,

> [A]pplying these criteria in this case, we conclude that the judge did not abuse his discretion.

Slip op. at 7.

I commend my colleagues for at least wanting to apply the Buck Creek factors, although to what they applied them remains a mystery, because it is abundantly clear from the record that the judge made no such attempt when he granted the stay.

> Upon the unopposed motion of the Respondent further proceedings in the captioned cases are hereby stayed pending the completion by the Secretary of a related criminal investigation. The Secretary is directed to report to the undersigned in writing regarding the status of the related investigation on December 1, 1995, and on the first day of each month thereafter.

Unpublished Order dated Oct. 27, 1995 (complete text). The only factor the judge appears to have applied to the request for a stay is expediency in granting it.

With respect to lifting the stay, the majority is more explicit in justifying the judges actions under the *Buck Creek* criteria:

> In deciding to lift the stay order and conduct the hearing, he properly accommodated the competing interests involved by evaluating the prejudice to Capitol that would result from going forward without Bonfili's testimony, versus the adverse impact on the public interest that would result from further delay.

Slip op. at 7.

How did the judge "properly accommodate [] the competing interests?" How did he "evaluat[e] the prejudice to Capitol?" How did he consider the "public interest that would result from further delay?" How, in other words did the judge apply the Buck Creek factors to assure due process for Capitol? He did it all in a single sentence:

> The Stay Orders previously issued in these cases are hereby lifted.

Unpublished Order Lifting Stay/Notice of Hearing and Prehearing Order dated Aug. 7, 1996.

It is possible the judge improvidently granted the stay in the first place. Having made no attempt to apply the *Buck Creek* factors, the judge made no further requests for information from the parties to supplement the minimal amount of detail presented by the petitioner. It is not even clear from the record that there ever was a criminal investigation. The nature of the accident in which Bonfili was severely injured, an inadvertent act that, according to the experienced inspector who wrote the citation, put only himself at risk, is hardly the type of situation that warrants investment of precious MSHA resources on a section 110(c) special investigation of a corporate officer "who knowingly authorized, ordered or carried out such

violation." 30 U.S.C. § 820(c). The obviousness of this reasoning is borne out by the fact that such charges were eventually dropped before trial. That MSHA would squander even more scarce agency resources on a section 110(d) criminal investigation of Bonfili for a "wilful" violation does not seem credible, given that agency's usual efficient allocation of assets. Since any "wilful" criminal charge would have had to be predicated on a bizarre legal theory that Bonfili deliberately intended to maim or kill himself, I find it hard to believe that MSHA wasted any time, money or personnel on such a questionable errand. *Buck Creek* obligated the judge to inquire into the commonality of evidence, the timing of the stay request, prejudice to litigants, the efficient use of agency resources and of course the public interest. 17 FMSHRC at 503. Had he done so, the judge may well have determined that no serious effort to bring criminal charges against Bonfili was ever initiated and thus there was no need for the stay requested by Capitol Cement. Since no such scrutiny was ever applied to the request for a stay there is no record to review on appeal to determine whether the judge abused his discretion in granting the stay. When a judge's action is arbitrary, unsupported by record evidence and unexplained, it ought not to be upheld.

Once the judge granted the stay, whether or not it was improvidently granted, he was under an equal obligation to apply the *Buck Creek* factors before lifting the stay. Upon granting the stay, the judge lent the mantel of governmental authority to what may have been mere suspicion on the part of the petitioner. Even if an abortive criminal investigation had inexplicably been ordered, the judge's *Buck Creek* scrutiny would likely have forced the investigating agency to reassess the wisdom of that decision once it was forced to justify the impact of the criminal investigation on the civil proceeding by disclosing "the commonality of evidence" to the judge. Because this was not done before the stay was granted, the unverified criminal investigation became an operable fact in the matrix of the case, necessitating Capitol Cement's invocation of due process rights.

Unable to review the judge's stay order because it was not included in Capitol's petition for discretionary review, I have to assume, as the majority does, that the stay was justified and properly granted. *See* 30 U.S.C. § 823(d)(2)(A)(iii). Thus Capitol's due process rights could only be protected if the judge properly applied *Buck Creek* to insure that Capitol would fairly be able to put on an adequate defense without Bonfili as a witness. The document upon which Capitol had to rely in determining if its due process rights had been fairly considered was the single sentence offered by the judge in lifting the stay. Without question, the judge's order falls far short of the Commission's standard for procedural due process set out in *Buck Creek*. As to the question of whether I have elevated form over substance, it is worthwhile to note that many countries make much more grandiose constitutional promises of rights and entitlements than our venerable Constitution. What we have that many do not is the means to exercise our rights. That means is procedural due process.

Accordingly, I would vacate the judge's decision and remand for the judge to reconsider whether the stay order should be lifted based upon his application and analysis of the factors set forth in *Buck Creek*, 17 FMSHRC at 503. *See Peabody Coal Co.*, 17 FMSHRC 508, 512 (Apr. 1995) (vacating and remanding for application of correct legal standard); *Energy West Mining Co.*, 15 FMSHRC 1836, 1839-40 (Sept. 1993) (same).

James C. Riley, Commissioner

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